

IP 04-0014-CR 1 T/F USA v Cummings
Magistrate Kennard P. Foster

Signed on 2/17/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Cause No. IP 04-14-CR-01 (T/F)
)	
CHARLES A. CUMMINGS,)	
)	
Defendant.)	

MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION

This matter is before the undersigned U. S. Magistrate Judge pursuant to the Order entered by the Honorable John Daniel Tinder, Judge, on January 13, 2005, designating this Magistrate Judge to conduct a hearing on the Petition for Summons or Warrant for Offender Under Supervision filed with the Court on January 22, 2004, and the Supplemental Petition for Warrant for Offender Under Supervision, filed August 11, 2005, and to submit to Judge Tinder proposed Findings of Facts and Recommendations for disposition under Title 18 U.S.C. §3401(i) and 3583(e).

All proceedings were held on February 17, 2006, in accordance with Rule 32.1 of the *Federal Rules of Criminal Procedure*. Mr. Cummings appeared in person with his appointed counsel, Juval Scott, Office of Indiana Federal Community Defender. The government appeared by Donna Eide, Assistant United States Attorney. U. S. Parole and Probation appeared by Tim Hardy, U. S. Parole and Probation officer, who participated in the proceedings.

The Court conducted the following procedures in accordance with Rule 32.1(a)(1) *Federal Rules of Criminal Procedure* and Title 18 U.S.C. §3583:

1. That Juval Scott was present and represented Mr. Cummings in regard to the pending Petition for Revocation of Supervised Release and Supplemental Petition for Revocation of Supervised Release.

2. Copies of the Petition for Revocation of Supervised Release and Supplemental Petition for Revocation of Supervised Release were provided to Mr. Cummings and his counsel who informed the Court that they had read and understood the specifications of violation and waived further reading thereof.

3. Mr. Cummings was advised of his right to a preliminary hearing and its purpose in regard to the alleged specified violations of his supervised release contained in the pending Petition and Supplemental Petition.

4. That Mr. Cummings would have a right to question witnesses against him at the preliminary hearing unless the Court, for good cause shown, found that justice did not require the appearance of a witness or witnesses.

5. That Mr. Cummings had the opportunity to appear at the preliminary hearing and present evidence on his own behalf.

6. That if the preliminary hearing resulted in a finding of probable cause that Mr. Cummings had violated an alleged condition or conditions of his supervised release set forth in the Petitions, he would be held for a revocation hearing before the undersigned Magistrate Judge, in accordance with Judge Tinder's designation entered on January 13, 2005.

7. Ms. Scott stated that Mr. Cummings would stipulate there is a basis in fact to hold him on the specifications of violation of supervised release set forth in the Petition and Supplemental

Petition. Mr. Cummings executed a written waiver of the preliminary examination, which was accepted by the Court.

8. Mr. Cummings, by counsel, stipulated that he committed the violations specified as set forth in the Petition for Warrant or Summons for an Offender Under Supervision and Supplemental Petition for Warrant or Summons for an Offender Under Supervision, described as follows:

Petition for Warrant or Summons for Offender Under Supervision, filed January 12, 2005:

<u>Violation Number</u>	<u>Nature of Noncompliance</u>
1	<p>“The defendant shall not illegally possess a controlled substance.”</p> <p>On November 17, 2004, the defendant submitted a urine specimen which tested positive for cocaine. On November 22, 2004, during a scheduled office visit, he denied using or possessing cocaine on or about November 17, 2004. He also refused to sign a Drug Test Declaration Form. On December 2, 2004, the urine specimen submitted by the offender was confirmed positive for cocaine metabolites by Kroll Laboratories.</p> <p>On November 22, 2004, the offender submitted a urine specimen which tested positive for cocaine. This constitutes the offender’s second positive drug screen for cocaine.</p>
2	<p>“The defendant shall report to the probation officer as directed by the court or probation officer and follow the instructions of the probation officer.”</p> <p>On November 29, 2004, the offender was verbally instructed to call the probation officer the following morning for reporting instructions. The offender failed to call the probation officer as directed.</p> <p>On December 11, 2004, the probation officer attempted unsuccessfully to locate the offender at his reported address in Kokomo, Indiana. The probation officer made several phone calls to the offender’s residence and his cell phone in an attempt to contact hi, but to no avail.</p>

On December 16, 2004, the probation officer sent a letter to the offender's residence instructing him to report to the U.S. Probation Office in Muncie on December 20, 2004 at 10:30 a.m. The offender failed to report as directed. The probation officer has not had personal contact with the offender since November 22, 2004. The offender's whereabouts are unknown at this time.

- 3 **“The defendant shall report to the probation officer and submit a truthful and complete written report within the first five days of each month.”**

The offender failed to submit monthly supervision reports for November and December 2004.

- 4 **“You shall pay any restitution that is imposed by this judgment, and that remains unpaid at the commencement of the terms of supervised release.”**

Since September 16, 2004, the offender has failed to make his agreed monthly restitution payment of \$20.00. As of January 5, 2005, the restitution balance is \$119,062.60. The offender's special assessment fee balance is \$648.00.

Supplemental Petition for Warrant or Summons for Offender Under Supervision, filed

August 11, 2005:

- 5 **“While on supervised release, the defendant shall not commit another federal, state, or local crime. The defendant shall not illegally possess a controlled substance.”**

On March 5, 2004, charges were filed against the offender in Howard County Superior Court 3 for Count 1, Conversion, as a class A misdemeanor under cause number 34D03-0403-CM-00400. On July 19, 2005, an arrest warrant was issued for the offender for failure to appear for a bench trial. Bond is set at \$500.00.

On June 16, 2005, the offender was arrested by the Valparaiso Police Department in Porter County, Indiana, and charged with Count 1, Auto Theft, Class C Felony; Count 2, Auto Theft, Class D felony; Count 3, Possession of Marijuana, Class A Misdemeanor; and Count 4, False Informing, Class B Misdemeanor, under cause number 64D02-0506-FC-5011. On June 20, 2005, the offender appeared for an initial hearing on the charges in Porter County Superior Court 2.

He entered a plea of not guilty and a jury trial was set for October 3, 2005. Bond was set at \$20,000; however, a hold was placed on the offender by Howard County Superior Court. On July 29, 2005, the U.S. Marshal Service placed a detainer on the offender for a warrant previously issued for violation of supervised release. The offender is presently in custody at the Porter County Jail.

6 **“The defendant shall not leave the judicial district without the permission fo the Court or the probation officer.”**

On June 16, 2005, the offender was arrested by the Valparaiso Police Department in Porter County, Indiana, int eh Northern District of Indiana on new charges. The offender did not have permission to leave the judicial district.

The Court placed Mr. Cummings under oath and he admitted the above violations.

Counsel for the parties further stipulated the following:

1) Mr. Cummings has a relevant criminal history category of VI. *See*, U.S.S.G. §7B1.4(a).

2) The most serious grade of violation committed by Mr. Cummings constitutes a Grade B violation, pursuant to U.S.S.G. §7B1.1(b).

3) Pursuant to U.S.S.G. §7B1.4(a) upon revocation of supervised release, the range of imprisonment applicable to Mr. Cummings is 21-24 months.

4) The parties agreed on the appropriate disposition of the case as follows:

The defendant be sentenced to a period of confinement of 24 months to the custody of the Attorney General. After service of sentence, the defendant shall not be subject to supervised release.

The Court, having heard the admissions of the defendant, the stipulations of the parties, and the arguments and discussions on behalf of each party, **NOW FINDS** that the defendant violated the above-delineated conditions of his supervised release as to each case. The defendant’s

supervised release is therefore **REVOKED** and Charles Anthony Cummings is sentenced to the custody of the Attorney General or his designee for a period of 24 months. After service of his sentence, the defendant shall not be subject to supervised release.

Counsel for the parties and Mr. Cummings stipulated in open Court waiver of the following:

1. Notice of the filing of the Magistrate Judge's Report and Recommendation;
2. Objection to the Report and Recommendation of the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §636(b)(1)(B); Rule 72.b, *Federal Rules of Civil Procedure*, and S.D.Ind.L.R.72.1(d)(2), *Local Rules of the U. S. District Court for the Southern District of Indiana*.

Counsel for the parties and Mr. Cummings entered the above stipulations and waivers after being notified by the undersigned Magistrate Judge that the District Court may refuse to accept the stipulations and waivers and conduct a revocation hearing pursuant to Title 18 U.S.C. §3561 *et seq.* and Rule 32.1 of the *Federal Rules of Criminal Procedure* and may reconsider the Magistrate Judge's Report and Recommendation, including making a *de novo* determination of any portion of the Report or specified proposed findings or recommendation upon which he may reconsider.

WHEREFORE, the U. S. Magistrate Judge **RECOMMENDS** the Court adopt the above report and recommendation revoking Mr. Cummings' supervised release and the sentence imposed of imprisonment of 24 months, in the custody of the Attorney General or his designee. There shall be no term of supervised release at the conclusion of Mr. Cummings' term of incarceration.

The Magistrate Judge requests that Tim Hardy, U. S. Parole and Probation Officer, prepare for submission to the Honorable John Daniel Tinder, Judge, as soon as practicable, a supervised release revocation judgment, in accordance with these findings of facts, conclusions of law and recommendation.

IT IS SO RECOMMENDED this 17th day of February, 2006.

Kennard P. Foster, Magistrate Judge
United States District Court
Southern District of Indiana

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U. S. Parole and Probation

U. S. Marshal Service